Supreme Court, U.S.
FILED
MAY 2 1991
OFFICE OF THE CLERK

No. 90-1014

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. LEE, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, *etc.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE CLARENDON FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

RONALD D. MAINES
RHONDA L. NEIL
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037
(202) 296-5950

KEMP R. HARSHMAN *
JONATHAN KVANVIG
THE CLARENDON FOUNDATION
4201 S. 31st Street
Suite 826
Arlington, Virginia 22206
(202) 653-7451

* Counsel of Record

May 2, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1014

ROBERT E. LEE, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, *etc.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE CLARENDON FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of this Court, The Clarendon Foundation respectfully submits this brief amicus curiae in support of Petitioners, Robert E. Lee, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Clarendon Foundation is a non-profit, non-partisan legal foundation concerned with significant legal issues

related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The Foundation participates in various forums in cases where the resolution of constitutional issues may be aided by philosophical and historical analyses in addition to case law and public policy considerations. The Clarendon Foundation is committed to an on-going review of the basic tenets of our constitutional government, in the spirit of George Mason's admonition that ". . . no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principals." The instant case raises questions of paramount significance to the public interest. We believe the Foundation's perspective will complement Petitioner's brief and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

This case is not merely another school prayer controversy. More fundamentally, it concerns the right of the state to officially acknowledge belief in the existence of a Supreme Being as a central tenet of our constitutional government. The Court is thus presented with the opportunity to provide much needed clarification in one of the most confusing areas of Constitutional jurisprudence, the Establishment Clause of the First Amendment.

The decisions of the lower courts erroneously employed the test of *Lemon v. Kurtzman*. The *Lemon* test requires a "law respecting an establishment of religion." But there is no legislation involved in this case.

Moreover, the lower courts' opinions reflect a fundamental misunderstanding of the historical relationship between church and state and the role of religion in public life envisaged by the Framers of the Constitution. The *Lemon* Court taught that total separation between church and state is not possible in an absolute sense, and that some relationship between government and religious

organizations is inevitable. The lower courts failed to apprehend this essential component in current Establishment Clause analysis.

Although inconsistencies in the lower courts' approaches demonstrate the deficiencies of the *Lemon* test as applied to this case, the teachings of the precedents upon which *Lemon* relied, especially *Walz* and *Zorach*, have not diminished in value. The Court has the opportunity to resolve the judicial confusion surrounding the Establishment Clause by reaffirming the wisdom of these earlier opinions.

Further, the Court has an opportunity to refine the legal doctrines applicable to state-religion interaction where no legislation is at issue, in cases similar to *Marsh v. Chambers*. The Court must reassess the role of religion in public life. There is adequate historical justification for concluding that government has an interest in acknowledging a religious belief in the existence of a Supreme Being. The Bill of Rights itself is a codification of *inalienable* rights—natural rights endowed by a Creator, not by another person or a parchment. Rightly understood, mere reference to a deity at a public school graduation ceremeny cannot be actionable under the Constitution.

The Court should formally recognize, as is implicit in its prior decisions, that the objective of separation between church and state (in the absence of legislation) is not inconsistent with mutual interaction so long as the religious activity is non-sectarian in nature and neither the state nor the church in any way intrudes on the sovereignty of the other.

Finally, the Court should declare that the First Amendment is not to be used to promote irreligion. It is ironic, indeed, and misguided, that the Establishment Clause has come to be used as a weapon against religious observance when its very purpose was to protect religious activity from interference by the state.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE ESTABLISHMENT CLAUSE TEST SET OUT IN *LEMON v. KURTZMAN* BECAUSE THIS CASE DOES NOT INVOLVE A "LAW" RESPECTING AN ESTABLISHMENT OF RELIGION.

The conflict among circuit courts concerning the constitutionality of invocations and benedictions at a public school graduation ceremony results from the application of differing standards to those cases. The historical analysis approach of *Marsh v. Chambers*, 463 U.S. 783 (1983), has led the Sixth Circuit and other courts to uphold the constitutionality of such prayers. *See Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987). By contrast, the "purpose-effect-entanglement" test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), employed by the lower courts in this case has produced a contrary result.

A. The *Lemon* Test Was Designed For Statutory Construction.

A key to the proper resolution of this case lies in the wording of the First Amendment, wherein the government is prohibited from enacting any "*law* respecting an establishment of religion . . . ." (emphasis added). Which of the noted precedents controls depends upon whether the Federal or state government involved has enacted specific legislation respecting religious belief or practice. The express phrasing of the *Lemon* test indicates it was designed for the purpose of statutory construction:

> First, the *statute* must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive governmental entanglement with religion." *Walz*

> *v. State Tax Commission*, 397 U.S. 664, 674 (1970)]. . . .

Lemon, 403 U.S. at 612-13 (emphasis added).

The principal precedent relied upon by the Court in *Lemon* recognizes this distinction. In *Zorach v. Clausen*, 343 U.S. 306, 312 (1952), the Court was concerned with public school "release time" programs where students were excused from classes to attend religious instruction or services. The Court observed:

> . . . apart from that claim of coercion, we do not see how New York by this type of 'released time' program has made a *law* respecting an establishment of religion within the meaning of the First Amendment.

Zorach, 343 U.S. at 312 (emphasis added).

But there was no such law at force in this case. (The legal predicate for Mr. Weisman's complaint was that the officials who sponsored the graduation ceremony and invited Rabbi Gutterman to participate were acting under color of state law. The misuse of official authority typically denoted by that concept, however, is lacking in this record. There is no evidence that Mr. Weisman or his child felt compelled to acquiesce in the prayers.) The district court erred in failing to recognize that the scope of the Establishment Clause (and hence the *Lemon* test) is limited, applying only to "laws respecting an establishment of religion."

The logic of undertaking an Establishment Clause analysis with this feature of the First Amendment at the fore is recognized in many of this Court's decisions. For instance, in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), Mr. Justice Black observed that the First Amendment

> . . . means at least this: Neither a state nor the Federal Government can . . . pass *laws* which aid one

> religion, aid all religions, or prefer one religion over another.

(emphasis added).

This perspective is likewise found in the Court's opinion in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963):

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a *secular legislative* purpose and a primary effect that neither advances not inhibits religion.

(emphasis added).

A careful reading of the *Marsh* decision shows that the Court made a distinction in that case between a "law" and a longstanding "practice." *Lemon* did not control because a law was not involved. Rather, the Court framed the issue to determine "whether any features of the Nebraska *practice* [of legislative prayer] violate the Establishment clause." *Marsh*, 463 U.S. at 792 (emphasis added).

In a dissenting opinion in *Marsh*, Justices Brennan and Marshall, relying upon the *Lemon* test, attempted to expand that analysis to include state "programs" not instituted by statute. The dissent characterized the majority's decision in *Marsh* as an "exception to the Establishment Clause doctrine to accommodate legislative prayer." *Marsh*, 463 U.S. at 796. Similarly, the lower courts in this case relied upon that interpretation in dismissing *Marsh* as a narrow exception to *Lemon*, extending only to official religious practices, such as legislative prayer, that were in place when the First Amendment was created. We respectfully urge that this analysis is incorrect.

Rather than an exception to *Lemon*, the *Marsh* case should be understood as a different kind of Establishment Clause case, subject to a different analytical standard, precisely because *Marsh* did not concern a statute.

According to *Lemon*, when legislation respecting religion is involved, a court should interpret the language of the First Amendment by directing its attention to

> . . . the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity'. . . .

Lemon, 403 U.S. at 613. This guideline is based on an interpretation of the First Amendment by this Court in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970). In that case, the Court reviewed the history of state-church interaction in colonial times and noted the state "sponsorship" of the Church of England by the Crown. *Id.* at 668. It is clear in *Walz* that sponsorship meant much more than mere accommodation—the *de minimis* involvement of the state found in the instant case.

B. There Are Areas Where Church And State Can Constitutionally Interact.

There is an area of interaction between church and state which falls outside the bounds of the Establishment Clause as illustrated in *Zorach*. There the Court rejected the notion that church and state were to be "aliens to each other" under the Constitution. *Zorach*, 343 U.S. at 312. Instead, the Court outlined some of the areas where the state may interact with religion:

> Churches [can] be required to pay . . . property taxes. Municipalities [are] permitted to render police or fire protection to religious groups.

Id., and, conversely, where religion can interact with the state:

> Prayers in our legislative halls; the appeals to the Almighty in messages of the Chief Executive, the proclamations making Thanksgiving Day a holiday; so help me God in our courtroom oaths. . . .

Zorach, 343 U.S. at 312-13.

It is significant that the *Lemon* Court, in qualifying the separation of church and state, mentions only those areas where the state may interact with religion:

> Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of *necessary and permissible* contacts.

Lemon, 403 U.S. at 614 (emphasis added). It is not clear why interaction of religion with the state is not mentioned in *Lemon*, but the district court in this case unwittingly may have been influenced by the Court's lack of attention to this crucial point.

Zorach stands for the proposition that relations between church and state under the Constitution are to be friendly and constructive, not merely "necessary and permissible." The opinion concludes by asserting: "We cannot read into the Bill of Rights . . . a philosophy of hostility to religion." *Zorach*, 343 U.S. at 315. The Court expounded this point in some detail:

> When the state encourages religious instruction or *cooperates* with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates the public service to their spiritual needs.* To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor

> blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be *neutral* when it comes to competition between sects.

Zorach, 343 U.S. at 313-14 (emphasis added).

This statement goes to the very heart of the matter now before this Court. The government may "cooperate" with religious authorities without losing its "neutrality." Indeed, the state may "accommodate a public service to the spiritual needs" of the people. That is precisely what the school board did in arranging for a member of the clergy to offer an invocation and benediction in the graduation ceremony in this case.

C. Government May Constitutionally Cooperate With Religion.

Cases in which the state may cooperate with religion without constitutional infraction include those involving a type of "common law" where historical precedent is relevant and dispositive. It is a case of this nature, decided on the basis of longstanding tradition, of which *Marsh* is representative. *Marsh* countenanced the notion that existed at the founding of this Nation that religion has a legitimate role in public life.

Although the Founders opposed preferential treatment for any religious sect, public acknowledgements of religion or incidental interaction between church and state were commonplace. Recognition of this tradition allows the government to create a climate to promote the free exercise of religion, as recognized by the Court in *Walz*:

> Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading

> to an established church or religion and on the contrary it had operated affirmatively to help guarantee the free exercise of all forms of religious belief.

Walz, 397 U.S. at 678.

In this way, the government can act to balance the Free Exercise and Establishment elements of the First Amendment. As the *Walz* Court recognized, government neutrality—the principal concern of Establishment Clause analysis—must be evaluated in this light.

> The Court has struggled to find a *neutral* course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

Walz, 397 U.S. at 669.

Where there is no law respecting an establishment of religion, the state must have the latitude to fashion its relationship to religion by enhancing the free exercise of religious belief. Viewed with this orientation, the prayers at issue in this case did not run afoul of the First Amendment.

II. EVEN IF *LEMON* WERE A PROPER STANDARD IN THIS CASE, IT HAS BEEN WRONGLY APPLIED BECAUSE THE RESULT OF THE DECISION CONTRADICTS THE PRECEDENTS UPON WHICH *LEMON* IS BASED.

The *Lemon* test can only be properly understood by reference to the precedents the Court relied upon in that case, specifically *Walz* and *Zorach*. *Zorach* stands for the proposition that separation of church and state is not absolute and that "references to the Almighty that run through our laws, our public rituals, [and] our *ceremonies*" were not proscribed by the First Amendment. *Zorach*, 343 U.S. at 313 (emphasis added). Moreover, the Court in *Zorach* took judicial notice that Americans "are

a religious people whose institutions presuppose a Supreme Being." *Id.*

In *Walz*, the Court warned against construing "the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz*, 397 U.S. at 671. In addressing the constitutionality of tax exemption of church property, the Court found no state "sponsorship" of religion "since government does not transfer part of its revenue to churches . . ." *Walz*, 397 U.S. at 675.

Viewed in the context of these key precedents which are the foundation for the *Lemon* test, the defects in the lower courts' analyses can be seen clearly. Not only were ceremonial prayers deemed unconstitutional, the mere refence to deity was viewed as infecting the invocation and benediction. And the district court found sufficient reason to bar clergy from participation in a public ceremony despite the lack of any direct financial benefit to any particular religious organization.

The *Zorach* decision warns that interpretation of the First Amendment to mandate separation between church and state in "all respects" would violate "common sense" and "the state and religion would [become] aliens to each other—hostile, suspicious, and even unfriendly." *Zorach*, 343 U.S. at 313. The *Walz* Court noted:

> Mr. Justice Cardozo commented in The Nature of Judicial Process 51 (1921) on the 'tendency of a principle to expand itself to the limits of its logic'; such expansion must always be contained by the historical frame of reference of the principle's purpose. . . .

Walz, 397 U.S. at 678-79. In short, the lower courts' rendering of *Lemon* exceeded the limits of the logic of the Establishment Clause, as that principle was expounded in *Zorach* and *Walz*.

III. THE DISTRICT COURT'S RULING THAT A CEREMONIAL PRAYER WAS UNCONSTITUTIONAL DUE SOLELY TO A REFERENCE TO DEITY IS ERRONEOUS BECAUSE THE GOVERNMENT HAS AN INTEREST IN ACKNOWLEDGING THE EXISTENCE OF A SUPREME BEING.

In *Zorach*, Justice Stewart took judicial notice of the fact that Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. Other decisions such as *Walz*, 397 U.S. at 678 and *Marsh*, 463 U.S. at 792, have highlighted the religious tradition of this Nation. We submit that this history is evidence that the State has an interest in the acknowledgment of religious belief in a Supreme Being. More is involved in this and similar cases than heritage and tradition, for at the heart of this religious belief lies the very foundation of the Bill of Rights.

One need go no further than the Federalist Papers to discern the importance of a robust religious community to the Framers of the Constitution. Madison's view was that a religious orientation would serve as the foundation for personal freedoms and limited government. A religious foundation would enable the new democracy to better meet the challenges before it and would provide a principled basis upon which to build. Surely, the American experiment would end in failure unless the people were principled and virtuous.

Virtue would be promoted by the church, the family and the school. People would conform to the needs of democracy out of a sense of duty. The ultimate allegiance to the "Governor of the Universe" would maintain order and personal freedom.

The importance of religion in the organization of American Society is evident in Madison's statement that

duty to God "is precedent both in order of time and degree of obligation, to the claims of Civil Society." Why was a religious belief in a Supreme Being so important? Because recognition that men were subject to a higher authority would keep society in balance between the extremes of anarchy and despotism.

The Founders believed that government officials were responsible not only to the people, but to a Supreme Being. Hence, each Branch of the federal government acknowledged a religious belief in deity in its practices. The Senate and House of Representatives hired chaplains to offer opening prayers. Prayers were offered at Presidential inaugural ceremonies, and Presidential Proclamations urged public supplication with respect to matters of national destiny. This history helps illuminate the strong interest of the state in acknowledging a religious belief in deity.

The rulings of the lower courts with respect to nondenominational prayer ignore this historical imperative and would produce anomalous results. For instance, the Declaration of Independence would be considered a nondenominational prayer because it refers to a Supreme Being and asks for divine assistance. Under the reasoning of the lower courts, that document could not be read at a public school graduation ceremony in its entirety without violating the Establishment Clause.

In considering a legal challenge to ceremonial prayer or a state action acknowledging a religious belief in deity, courts should first determine if any constitutional rights have been violated; if not, the interests of the parties should then be balanced. (All that is required here is a simple balance of interests. A compelling state interest is not necessary when no constitutional right has been violated.)

A. Respondent's Constitutional Right to Exercise Religious Beliefs Has Not Been Infringed.

In general, the nature of ceremonial prayer does not conflict with the constitutional right to exercise one's religious beliefs. This is because invocations and benedictions at public ceremonies are not like prayers offered in churches. In most religious services the congregation is asked to join in the prayer. However, in public ceremonies, a member of the clergy is introduced and offers a prayer without asking those attending to join. Each person is free to respond as he sees fit—by bowing his head and joining in the prayer, by ignoring it altogether, by speaking with his neighbor, or even by leaving so as not to hear it.

Mr. Weisman does not contend that his constitutional right to freely exercise his religious beliefs has been abridged. Nor does he allege that he was asked to pray. He objected merely because he did not want to witness a prayer being said. But it is impossible, by definition, to force someone to join in prayer, which is spiritual communication with God, if he does not believe in a Supreme Being or does not agree with what is being said. Being merely a witness to prayer in this setting no more involves an establishment of religion than does driving by a Christmas tree and Menorah. *See Lynch v. Donnelly*, 465 U.S. 668 (1984).

B. Respondent Does Not Have an Overriding Interest in Enjoining Ceremonial Prayer at a State-Sponsored Function.

Mr. Weisman's complaint alleged that the school board would not be harmed by an injunction against ceremonial prayer. This is tantamount to saying that the government has no interests at stake in such an instance. Yet at least two state interests plainly suggest themselves; first, to maintain a *belief* that basic human rights are God given and beyond encroachment; second, to promote *faith* in the principles of the American system of demo-

cratic government. By contrast, the government would not have a valid interest in any activity which would give preferential treatment to a particular sect because that would engender partisanship and political dissension.

As for Respondent's interests in the case, his complaint states that he is opposed to the expenditure of tax funds for school ceremonies which include prayer. But the interests here are insignificant because the monetary expenditure required for a clergyman's participation in the graduation exercise would be minimal.

Second, Mr. Weisman is offended by the inclusion of prayer in the public school graduation ceremony of his child. The fact that a prayer is objectionable because it is offered by a person of another belief should not be constitutionally significant unless there is an intention to establish or interfere with religious beliefs or practices. This reasoning reflects one of the underlying purposes of the First Amendment, which is to protect freedom of conscience. In this case, Mr. Weisman and his child were of the same faith as the religious official offering the prayer. Thus, it is difficult to understand how the Weismans' freedom of conscience could have been suppressed.

A person's being offended should not be a sufficient ground to find an Establishment Clause violation. Presumably, virtually any prayer could be offensive to someone. Moreover, there are certain to be individuals who attend public ceremonies that would be offended if a nondenominational prayer were not offered.

Finally, suppose there were others attending the graduation ceremony who were offended not by prayers, but by the remarks of the commencement speaker, which would, of course, be protected speech. Should offense at religious statements be more constitutionally significant than offense at political statements? The answer would be self-evident to the Framers because the principles of

religious freedom and political freedom developed simultaneously in their experiences founding the new government.

IV. THE ANALYSES OF THE LOWER COURTS DO NOT SHOW THAT THE PRAYERS AT ISSUE VIOLATE THE *LEMON* TEST.

Under the *Lemon* test as rendered by the lower courts in this case, state action which fails to satisfy any one of the following criteria is improper: the practice must have a secular purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and the practice must not foster an "excessive entanglement" with religion.

The second prong of the *Lemon* test—requiring government neutrality vis-à-vis religion—has been the most prominent concern of Establishment Clause analysis. The Court has held that government must "pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Elsewhere the Court has stated: "Government in our democracy, state and nation, must be neutral in matters of religious theory, doctrine, and practice. . . . The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97 (1968). Likewise, "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion," *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

Assuming *Lemon* were the relevant precedent for this case, there are fundamental flaws in the way the *Lemon* criteria were applied by the courts below. Principally, the lower courts' arguments are unsound because they prove too much. Ostensibly demonstrating an "establishment" of religion, the arguments actually eliminate the possibility of a neutral position altogether.

A. The Challenged Activity Achieved a Secular Purpose.

Regarding this first prong of the Lemon analysis, Circuit Judge Bownes reasoned as follows:

> Although reciting a prayer before a graduation ceremony might, as appellants argue, have the residual sectarian effects of solemnizing the occasion, the primary purpose is religious. Specifically invoking the name and the blessing of 'God' on the graduation ceremony is a supplication and thanks to 'God' for the academic achievement represented by the graduation and a hope for the continuation of such good fortune. It does not serve a purely or predominantly solemnizing function. A graduation ceremony does not need a prayer to solemnize it.

Petition at 9a-10a.

Judge Bownes' reasoning is reminiscent of other cases in which religious activity has been deemed unconstitutional because it assertedly lacked a secular purpose. *See, e.g., Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989) (finding practice of having invocations given prior to public high school football games violates First Amendment); *Graham v. Central Community School District*, 608 F.Supp. 531 (S.D. Iowa 1985) (striking down commencement invocation and benediction for lack of a secular purpose). The specific religious activity of prayer is particularly troublesome to advocates of this position because "prayer is the quintessential religious practice impl[ying] that no secular purpose can be satisfied." *Jaffree v. Wallace*, 705 F.2d 1226, 1534 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985). While this argument is beguiling, it fails upon closer inspection.

Judge Bownes' argument attempts to demonstrate that a prayer in this setting "does not serve a purely or predominantly solemnizing function" by showing (1) that the prayer is purely religious in nature and (2) that "a graduation ceremony does not need a prayer to solemnize

it." This latter claim is essential to the argument, for even if prayer is purely religious in nature, it can serve the function of solemnizing an occasion.

As it is stated, however, the second claim cannot carry the weight of the argument, for it implies that a prayer can only serve the solemnizing function if the prayer is required for the occasion to be solemnized. As a point of logic, of course, this does not follow. Something can serve a function without being necessary for it. For example, a table can serve the function of being where family meals are held without it being necessary that family meals are held at the table. Yet this implication of Judge Bownes' argument is significant, for it shows that he unwittingly applied not the actual first *Lemon* criterion but a stricter, untenable version of it: Instead of checking for a secular purpose, the stricter form requires that we check for a secular purpose *that cannot be achieved by non-religious means.*

But the *Lemon* test must be used as it stands, if it is to be used at all, because strengthening the formulation would rule out legitimate cooperation between government and religion. For example, it would rule out the use of a military chaplaincy, where the argument on behalf of cooperation between government and religion has to do with chaplains instructing troops on moral and ethical matters. Clearly, however, no such justification could succeed if the stricter version of the first *Lemon* criterion were adopted. As this Court has observed, "[f]ocus *exclusively* on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680 (emphasis added). Since such a result would be manifestly at odds with the purpose of the First Amendment, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973), this stricter formulation of the first *Lemon* prong must be rejected.

If, instead, Judge Bownes had meant to point out that graduation ceremonies are already solemn occasions, and thus that no prayer is needed to cause the occasion to be solemn, the argument is equally problematic. For the prayers need not be viewed as related to the solemnizing function as causes are to their effects. Instead, the prayers can serve this function by being *an expression*, rather than a cause, of the solemnity of the occasion. This purpose is every whit as secular as that of causing it to be the case that the event is solemn.

If there is an argument from the first prong of the *Lemon* test in this case, more must be said than that a graduation ceremony does not need a prayer to solemnize it. That is not enough to show that "government's actual purpose is to endorse . . . religion," as required under this aspect of the analysis. *Lynch*, 465 U.S. at 690. Rather, what must be shown is that the solemnizing function is not served by the prayer, or that it is not well served by it. But the lower courts presented no argument for either of these claims.

B. The Challenged Activity Did Not Advance or Inhibit Religion.

As analyses under this *Lemon* criterion have been articulated in court decisions, a chiefly "subjective" focus has emerged:

> [A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely *to be perceived* by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.

School District of City of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) (emphasis added).

The opinion of the district court contains ample evidence of this orientation:

> It is the union of prayer, school and important occasion that creates an identification of religion with a school function. The special nature of the graduation ceremonies underscores *the identification that Providence public school students can make.*

And again,

> Schoolchildren who are not members of the religions sponsored, or children whose families are non-believers, *may feel as though* the school and government prefer beliefs other than their own.

Petition at 25a (emphasis added).

At least two critical shortcomings appear, however, when exclusive attention is given to students' subjective impressions.

1. The argument from students' perceptions eliminates the possibility of a neutral position. Specifically, whenever government and religion are publicly associated, *support* for religion might be inferred by some students; and whenever the two are purposefully separated, *hostility* to religion might be inferred by others. If the argument based on students' perceptions is sound going one direction, it must be sound going the other. But taking both to be sound forecloses a neutral governmental position.

In this connection, the conceptual thicket created by use of an undefined metaphor such as "symbolic union," *School District of Grand Rapids*, 473 U.S. at 390, is evident if we assume *arguendo* that the activity at issue in this case in fact runs afoul of the Establishment Clause. To avoid constitutional infraction the government would be constrained to exclude religion from "milestone" events, rites of passage and other public ceremonies. Yet, in that event, a quite different message would be communicated. Careful exclusion of religion from events where invocations and benedictions are customarily pro-

nounced could be viewed as a symbolic preference on the part of the government for non-religion.

Ironically, this point was explicitly recognized by the district court. With respect to the exclusion of references to deity, the court observed: "Students might conclude that a deity is not an important part of their lives. [However,] this Court is not permitted to ruminate concerning the aptness of this possible result as the Establishment Clause is currently construed." Petition at 24a n. 7.

The district court's view that a concern for the "aptness of this possible result" would be out of harmony with the law indicates a myopia symptomatic of much Establishment Clause analysis. With their attention riveted on whether religion is unconstitutionally advanced in a given case, the courts often overlook that the very test applied to make that judgment may, in the circumstances, preclude the possibility of a neutral position.

2. Audience perceptions are not verifiable. Under the subjective effects analysis, the issue of governmental endorsement becomes a consideration of how the actions of the government will or might be misunderstood. Because this approach necessarily requires courts to make difficult calculations which, even in the end, are inherently non-verifiable, its value is extremely limited.

Instead, if there are more objective features to the practice which allegedly advances religion, the focus should be on these. It was a state-church relationship in this stricter sense which the Court had in mind in *Abington School District* when it warned of history's teaching that

> powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Govern-

ment would be placed behind the tenets of one or all of the orthodoxies.

374 U.S. at 222. The only activity which should legitimately cause concern is if government and religion are acting in concert to further the interests of religion by statute or regulation. If, however, both parties are merely participating in a rite of passage for students, with each having its own purposes, no objectionable union or concert should be found.

There is no evidence in the instant case of any concert between the government and religion. The evidence only supports identification in the weaker sense: The state, in this case through public school teachers and administrators, supports a public function which *associates* religious and governmental activities.

C. The Challenged Activity Did Not Involve Excessive Entanglement of Government and Religion.

Though neither the district court nor the court of appeals rest their decisions on the excessive entanglement prong, Judge Bownes was struck by the occurrence of excessive governmental entanglement with religion in this case because school officials were involved both in choosing the individual who led the prayers and in providing guidelines for a suitable non-denominational prayer. Thus, Judge Bownes argues that "[t]his supervision of the content of the prayers by the school officials implicates the entanglement prong," and that choosing the person who leads the prayer "has the effect of involving those teachers in choosing among various religious groups." Petition at 10a-11a.

The guidelines provided, however, were not state regulations; they were instead a set of standards set by a non-denominational religious organization, the National Conference of Christians and Jews. In offering these guidelines, the state was not attempting to regulate religion; it was merely trying to comply with the mandate

of the Establishment Clause itself not to support a particular religion.

In sum, none of the arguments from the three prongs of the *Lemon* test provides a sufficient basis for finding that the prayers at issue violate the Establishment Clause. For the arguments chronicled above focus on only one side of the issue. They consider whether a practice advances religion but fail to consider whether, turned in the other direction, the same analysis would inhibit religion. This oversight is due to an unarticulated assumption that a neutral position in cases involving the Establishment Clause has been carved out already when, in fact, the very tests utilized to assess the challenged actions preclude genuine neutrality toward religion.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

RONALD D. MAINES
RHONDA L. NEIL
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037
(202) 296-5950

KEMP R. HARSHMAN *
JONATHAN KVANVIG
THE CLARENDON FOUNDATION
4201 S. 31st Street
Suite 826
Arlington, Virginia 22206
(202) 653-7451

* Counsel of Record

May 2, 1991